APPEAL NUMBER SC 85731

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, EX REL. SAMUEL STEELEY,

Relator,

v.

**HONORABLE KENNETH OSWALD,
JUDGE OF THE CIRCUIT COURT OF MILLER
COUNTY, MISSOURI, ASSOCIATE DIVISION**

Respondent.

**Petition for Writ of Prohibition
Honorable Kenneth L. Oswald, Associate Judge
Circuit Court of Miller County, Missouri**

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This case involves an original proceeding for writ of prohibition filed by relator. At issue is whether respondent will exceed his authority, unless prohibited, in denying relator's request to record his preliminary hearing in a criminal case currently pending in the Circuit Court of Miller County, Missouri, Associate Judge Division, entitled *State of Missouri v. Samuel J. Steeley*, Case No. CR603-1041F.

Relator filed his Petition for Writ of Prohibition and Suggestions in Support with this Court on December 18, 2003. On December 19, 2003, relator filed a motion to expedite requesting the Court to expedite his petition and issue a decision prior to the preliminary hearing set for December 22, 2003. By order dated December 19, 2003, this Court sustained relator's motion and issued its preliminary writ. Respondent thereafter duly filed his Answer to relator's Petition on January 20, 2004.

This Court has jurisdiction pursuant to Article V, § 4 of the Missouri Constitution in that this is a proceeding for an original remedial writ.

STATEMENT OF FACTS

Although respondent does not dispute the statement of facts set forth in relator's brief, it does not provide a complete statement of facts concerning the issues raised herein. Consequently, respondent sets forth the following statement of facts:

On June 18, 2003, relator was charged with the felony offenses of statutory rape in the second degree in violation of § 566.034, RSMo, statutory sodomy in the second degree in violation of § 566.064, RSMo, and incest in violation of § 568.020, RSMo. His case is before the Circuit Court of Miller County, Missouri, Associate Judge Division.

On July 16, 2003, relator and his counsel appeared before respondent, and relator waived formal advisement of the charges against him. *See* Answer to Petition for Writ of Prohibition at 2 and Exhibit A attached thereto.[1] After amending the conditions of relator's bond, respondent set relator's case for preliminary hearing on November 10, 2003, at 9:00 a.m. *See* Answer to Petition for Writ of Prohibition at 2 and Exhibit A attached thereto. Neither at the hearing on July 16, 2003, nor at any time prior to the preliminary hearing set for November 10, 2003, did relator provide the prosecution with

[1] In a prohibition proceeding where relator filed no reply to respondent's return and no evidence was taken in the case, the Court will accept as facts of the case the matters alleged in the petition and admitted or not denied in the return, together with such other facts as are pleaded in the return and not denied by relator. *State ex rel. Jones v. Nolte*, 165 S.W.2d 632, 634, 350 Mo. 271 (1942).

any notice of his intent to record the preliminary hearing. *See* Answer at 2 and Exhibit A attached thereto.

When the parties appeared before respondent to commence the preliminary hearing on November 10, 2003, relator, by counsel, made an oral motion to allow a stenographic or verbatim record to be made of the preliminary hearing set for that date. In moving to record the preliminary hearing, relator agreed to retain, at his expense, a certified court reporter, who was present in the courtroom on November 10, 2003, to transcribe the proceedings at the preliminary hearing, and he agreed to provide a copy of the transcript to the prosecution free of charge. Relator's counsel further advised respondent that the reason for seeking to record the preliminary hearing was so relator could attack the child victim's credibility at trial to the extent her statements given to police, her recorded testimony at the preliminary hearing, her recorded testimony at a deposition to be taken later, and at the trial differed in any respect. *See* Answer at 2 and 3.

Respondent denied relator's motion and reset the case for preliminary hearing on December 22, 2003 to give relator time to seek a writ against respondent's order. *See* Answer at 2. In denying relator's motion, respondent properly considered and weighed the facts and circumstances of the case, including the lack of notice given by relator to the prosecution of the intent to record the preliminary hearing, the lack of authority cited by relator in support of the motion, the nature and purpose of the preliminary hearing in relation to the objectives relator sought to advance in recording the hearing, the rights of the relator including his right to later depose the child victim, the age of the child victim

and the rights afforded to her by the Missouri Constitution and the laws of the state. *See* Answer 3 and Exhibit A attached thereto. As such, respondent properly exercised his discretion in denying relator's motion to record the preliminary hearing because relator failed to show good reason or cause in support of his motion. *See* Answer at 3.

Relator filed his Petition for Writ of Prohibition and Suggestions in Support with this Court on December 18, 2003. On the following afternoon of December 19, 2003, relator filed a motion to expedite requesting the Court to expedite his petition and issue a decision prior to the preliminary hearing set for December 22, 2003. By order dated December 19, 2003, this Court issued its preliminary writ staying any further proceedings in this case and ordered respondent to file a written return on or before January 19, 2004[2] and to show cause why a writ of prohibition should not be issued in the case. Respondent thereafter filed his Answer to relator's Petition with the Court on January 20, 2004 and served a copy of relator's counsel that same day. Relator did not file any reply to respondent's Answer.

[2] January 19, 2004 was a legal holiday, and as such, the period of time prescribed or allowed for respondent to respond as ordered by the Court was extended to January 20, 2004. MO. R. CIV. P. 44.01(a).

POINTS RELIED ON AND AUTHORITIES

I. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO RECORD RELATOR'S PRELIMINARY HEARING BECAUSE RESPONDENT DID NOT EXCEED HIS AUTHORITY IN DENYING THE REQUEST AND THE DENIAL DOES NOT CONSTITUTE A CLEAR ABUSE OF DISCRETION BY RESPONDENT OR VIOLATE RELATOR'S SIXTH AMENDMENT RIGHTS IN THAT THE SIXTH AMENDMENT DOES NOT GRANT RELATOR THE RIGHT TO RECORD HIS PRELIMINARY HEARING OR TO OBTAIN A TRANSCRIPT THEREOF.

Cases

Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999 (1970)

Medina v. California, 505 U.S. 437, 112 S. Ct. 2572 (1992)

State v. Champ, 477 S.W.2d 81 (Mo. 1972)

State v. Maxwell, 400 S.W.2d 156 (Mo. 1966)

Constitutions and Statutes

U.S. CONST. amend. VI

MO. CONST. art. I, § 32

MO. REV. STAT. § 595.209

MO. R. CRIM. P. 22.10

MO. R. CRIM. P. 25.12

MO. R. CRIM. P. 25.13

II. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO RECORD RELATOR'S PRELIMINARY HEARING BECAUSE RESPONDENT IS NOT SUBJECT TO, OR PROHIBITED FROM ACTING BY, THE WRITS ISSUED BY THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT, TO A JUDGE OF THE CIRCUIT COURT OF LACLEDE COUNTY, MISSOURI IN THAT:

A. THE WRITS WERE ISSUED PRIOR TO THE ENACTMENT OF RULE 11(3) OF THE CIRCUIT COURT RULES OF THE TWENTY-SIXTH JUDICIAL CIRCUIT AND FOR THE REASON THAT THE WRITS DO NOT INVALIDATE THE PROVISIONS OF RULE 11(3) SINCE THE RULE IS NOT CONTRARY TO THE WRITS.

B. THE WRITS ARE DIRECTED TO THE JUDGE OF THE COURT WHO MADE THE ORDER BEYOND ITS JURISDICTION AND THEY ONLY APPLY TO OTHER JUDGES, WHO HAVE NOTICE OF THE WRITS AND WHO ARE ACTING UNDER THE AUTHORITY OF THE PROHIBITED COURT, AND RESPONDENT WAS NOT ACTING UNDER THE AUTHORITY OF THE CIRCUIT COURT OF LACLEDE COUNTY, MISSOURI IN DENYING RELATOR'S REQUEST TO RECORD HIS PRELIMINARY HEARING.

Cases

Burkholder ex rel. Burkholder v. Burkholder, 48 S.W.3d 596 (Mo. 2001)

State ex rel. Siegel v. Strother, 289 S.W.2d 73, 365 Mo. 861 (1956)

Thummel v. King, 570 S.W.2d 679 (Mo. 1978)

Other Authority

LOCAL COURT RULE 11

MO. R. CIV. P. 84.04

III. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO RECORD RELATOR'S PRELIMINARY HEARING BECAUSE RESPONDENT DID NOT EXCEED HIS AUTHORITY IN DENYING RELATOR'S REQUEST AND THE DENIAL DOES NOT CONSTITUTE A CLEAR ABUSE OF DISCRETION BY RESPONDENT IN THAT THERE IS NO CONSTITUTIONAL PROVISION, STATUTE, LAW OR RULE THAT PROHIBITS RESPONDENT FROM DENYING RELATOR'S REQUEST AND FOR THE FURTHER REASON THAT RULE 11(3) OF THE RULES OF THE TWENTY-SIXTH JUDICIAL CIRCUIT GRANTS RESPONDENT DISCRETION TO DENY RELATOR'S REQUEST.

Cases

Burkholder ex rel. Burkholder v. Burkholder, 48 S.W.3d 596 (Mo. 2001)

Thummel v. King, 570 S.W.2d 679 (Mo. 1978)

Other Authority

LOCAL COURT RULE 11

MO. R. CIV. P. 84.04

IV. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO RECORD RELATOR'S PRELIMINARY HEARING BECAUSE RESPONDENT DID NOT EXCEED HIS AUTHORITY IN DENYING RELATOR'S REQUEST AND THE DENIAL DOES NOT CONSTITUTE A CLEAR ABUSE OF DISCRETION ON THE PART OF RESPONDENT IN THAT § 544.390, RSMO, DOES NOT REQUIRE A TRANSCRIPT OF A PRELIMINARY HEARING AND FOR THE FURTHER REASON THAT § 544.390 HAS BEEN SUPERSEDED BY A SUBSEQUENTLY ENACTED RULE OF CRIMINAL PROCEDURE.

Cases

Burkholder ex rel. Burkholder v. Burkholder, 48 S.W.3d 596 (Mo. 2001)

State v. Ancell, 62 S.W.2d 443, 333 Mo. 26 (1933)

State v. Fleming, 451 S.W.2d 119, 121 (Mo. 1970)

Thummel v. King, 570 S.W.2d 679 (Mo. 1978)

Other Authority

MO. R. CRIM. P. 22.08

MO. R. CIV. P. 84.04

ARGUMENT

I. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO RECORD RELATOR'S PRELIMINARY HEARING BECAUSE RESPONDENT DID NOT EXCEED HIS AUTHORITY IN DENYING THE REQUEST AND THE DENIAL DOES NOT CONSTITUTE A CLEAR ABUSE OF DISCRETION BY RESPONDENT OR VIOLATE RELATOR'S SIXTH AMENDMENT RIGHTS IN THAT THE SIXTH AMENDMENT DOES NOT GRANT RELATOR THE RIGHT TO RECORD HIS PRELIMINARY HEARING OR TO OBTAIN A TRANSCRIPT THEREOF.

A. Standard of Review

As stated, this case involves an original proceeding for writ of prohibition filed by relator. The issue is whether respondent will exceed his authority, unless prohibited, in denying relator's request to record his preliminary hearing in a case pending before respondent in the Circuit Court of Miller County, Missouri, Associate Judge Division.

A writ of prohibition is an extraordinary remedy to correct and prevent a lower court from acting without or in excess of its jurisdiction. *State ex rel. Baldwin v. Dandurand*, 785 S.W.2d 547, 549 (Mo. 1990); *Knisley v. State*, 448 S.W.2d 890, 892 (Mo. 1970). As a result, a writ of prohibition is not a writ of right, and its issuance is vested in the sound discretion of this Court to be used with great caution in furtherance of justice. *Baldwin*, 785 S.W.2d at 549; *State ex rel. Henry v. Cracraft*, 168 S.W.2d 953,

954 (Mo. App. 1943). Nor should a writ of prohibition issue in doubtful cases, *Henry*, 168 S.W.2d at 954, but only when the usurpation of jurisdiction or an act in excess of jurisdiction is clearly evident. *State ex rel. Eggers v. Enright*, 609 S.W.2d 381, 382 (Mo. 1980).

A writ of prohibition cannot be used to infringe upon or direct a trial court's discretion, *State ex rel. Thomasville Wood Products, Inc. v. Buford*, 512 S.W.2d 220, 221 (Mo. App. 1974), nor can it be used to correct alleged or anticipated judicial errors or grievances which may be adequately addressed in the ordinary course of judicial proceedings by other adequate remedies or by appeal. *Baldwin*, 785 S.W.2d at 549; *Knisley*, 448 S.W.2d at 892.

A presumption of right action is afforded respondent, *Thomasville Wood Products*, 512 S.W.2d at 221, and the relator bears the burden of establishing that respondent usurped or acted in excess of his authority. *Eggers*, 609 S.W.2d at 382. For the reasons set forth below, it is clear that relator has failed to meet his burden that respondent has acted without jurisdiction, or has clearly acted in excess of his jurisdiction, or that relator will suffer considerable hardship as a consequence of respondent's action by which relator cannot address through other available remedies or by appeal. *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862-63 (Mo. 1986).

B. Sixth Amendment does not Grant Right to Record Preliminary Hearing

In Point I of his brief, relator contends that respondent should be prohibited from denying relator's request to record his preliminary hearing for the reason that such a denial violates relator's Sixth Amendment rights, which he argues "should permit relator

to record his preliminary hearing." From the use of the word "should" in his alleged point of error and the argument portion thereof, it is evident that relator concedes he does not have a "clear" right under the Sixth Amendment to record his preliminary hearing. Instead, relator is asking this Court to write into law—through the issuance of a writ of prohibition directed to respondent—relator's "notions of fairness, decency, and fundamental justice, in total disregard of the language of the Constitution itself." *See Coleman v. Alabama*, 399 U.S. 1, 13, 90 S. Ct. 1999, 2005 (1970)(Black, J., concurring).

With respect to the field of criminal law, the United States Supreme Court has defined the category of infractions that violate "fundamental fairness" very narrowly based on the specific guarantees enumerated in the Bill of Rights. *Medina v. California*, 505 U.S. 437, 443, 112 S. Ct. 2572, 2576 (1992). The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the Supreme Court has stated that the expansion of those constitutional guarantees under any open-ended rubric invites undue influence with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. *Id*. The explicit and specific guarantees of the Bill of Rights provide a full and complete description of the kind of "fair trial" the Constitution affords and it leaves no room for courts to add to or detract from the explicit guarantees. *Coleman*, 399 U.S. at 13 and 2005 (Black, J., concurring). As a result, the Constitution does not require courts or states to adopt a particular procedure on the basis that it may produce more favorable results for an accused, as relator advocates in this case. *Medina*, 505 U.S. at 451, 112 S. Ct. at 2580.

Relator cites the Court to the case of *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999 (1970), in support of his argument that the Sixth Amendment should afford relator the right to record his preliminary hearing. In that case, the Supreme Court held that an Alabama preliminary hearing was a critical stage of the state's criminal process at which defendants were entitled to the aid of counsel. *Id*. at 9-10 and 2004. The basis for the Supreme Court's holding was the plain and explicit language of the Sixth Amendment that provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. *Id* at 11-14 and 2005-06; U.S. CONST. amend. VI. As a result, the right to counsel at a preliminary hearing is guaranteed by the specific and explicit terms of the Sixth Amendment and is not based on a right to a "fair trial" as conceived by an accused or a court in disregard of the language of the Constitution.

The purpose of a preliminary hearing is not to finally adjudicate the guilt or innocence of an accused but to determine if there is probable cause to believe that an accused has committed a felony so that he may be bound over for trial. *State v. Hill*, 438 S.W.2d 244, 246 (Mo. 1969); *Gerstein v. Pugh*, 420 U.S. 103, 121-122, 95 S. Ct. 854, 867-68 (1975). It is designed to prevent a possible abuse of power by the prosecution and to permit the detention of an accused in the proper case. *Hill*, 438 S.W.2d at 246.

In determining that an Alabama preliminary hearing afforded an accused the right to counsel, the Supreme Court set forth four ways in which counsel could aid an accused at a preliminary hearing against erroneous prosecutions—the purpose for which an accused is afforded a preliminary hearing. *Coleman*, 399 U.S. at 9, 90 S. Ct. at 2003.

One of the ways the Supreme Court recognized that counsel could protect an accused against erroneous prosecutions is that a "skilled interrogation by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or to preserve testimony favorable to the accused of a witness who does not appear at trial." (Emphasis added). *Id*.

Taking the written words of the *Coleman* opinion out of context, relator concludes that the Supreme Court has determined that "the importance of the preliminary hearing" is for counsel of the accused to elicit testimony during the preliminary hearing as an impeachment tool for use at trial and to preserve such impeachment testimony favorable to the accused for trial. Relator's Brief at 18-19. However, the decision of the Supreme Court in *Coleman* does not afford relator a constitutional right to record his preliminary hearing, as relator argues, since such a right is not explicitly and specifically guaranteed by the Sixth Amendment. Furthermore, a decision by this Court granting relator a constitutional right to record his preliminary hearing is contrary to the decisions of the United States Supreme Court as to what constitutes "fundamental fairness" in the field of criminal law, and it promotes an expansion of the constitutional guarantees of the Bill of Rights under an open-ended rubric, which the Supreme Court has refused to employ. *Medina*, 505 U.S. at 443, 112 S. Ct. at 2576.

Certainly, the Supreme Court's opinion in *Coleman* provides that an accused may be allowed to record a preliminary hearing for the purpose of preserving testimony favorable to the accused of a "witness who does not appear at trial." However, in requesting to record his preliminary hearing before respondent, relator was not seeking to

preserve the child victim's testimony on the basis that he anticipated she would not appear at trial. Instead, relator advised respondent that his reason for seeking to record his preliminary hearing was so that he could attack the credibility of the child victim at trial for even the slightest variations in her testimony given to the police, at the preliminary hearing, at her deposition, and at trial.

Relator's desire to record his preliminary hearing does not stem from any quest for the truth as he maintains in this Court. To the contrary, relator seeks to avoid the truth. Relator's sole purpose in seeking to record his preliminary hearing is to escape the incriminating force of the child victim's testimony by seeking to attack her credibility at trial with the slightest variations in her testimony given at different times over the course of several months.

Further, it is worth noting that Rules 25.12 and 25.13 of the Missouri Rules of Criminal Procedure obviate a defendant's need to record his preliminary hearing as contemplated by the Court in *Coleman*. Those rules afford an accused the right and the means to preserve testimony for trial, by way of deposition, of any witness who may testify favorable to the accused but will not appear for trial. MO. R. CRIM. P. 25.12 and 25.13.

In addition to there being no explicit constitutional right to record a preliminary hearing, relator concedes that there is no statute or court rule that grants an accused the right to a recorded transcript of his preliminary hearing, other than an accused in a homicide case. *See* MO. R. CRIM. P. 22.10; MO. REV. STAT. § 544.370. Relator also concedes at page 19 of his brief that this Court has repeatedly held that an accused has no

right to a recorded transcript of his preliminary hearing, other than in homicide cases. *State v. Eaton*, 504 S.W.2d 12, 20 (Mo. 1973); *State v. Champ*, 477 S.W.2d 81, 83 (Mo. 1972); *State v. Quinn*, 405 S.W.2d 895, 899 (Mo. 1966); *State v. Maxwell*, 400 S.W.2d 156, 158-59 (Mo. 1966).

Relator has attempted to distinguish the foregoing cases in two ways—both of which are unpersuasive. First, he contends that because he is not requesting the state or the trial court provide the court reporter for the preliminary hearing or furnish him, free of charge, with a copy of the transcript, his case is different in that he has offered to pay for the court reporter and transcript. However, in *Maxwell*, this Court held that an accused has no constitutional right to transcript of preliminary hearing testimony, and it is immaterial whether the accused sought to pay for it or sought it free of charge. 400 S.W.2d at 159. Similarly, in *Champ*, the Court held that neither an affluent man nor a poor man may obtain a transcript of a preliminary hearing in a non-homicide case because there is no rule or provision for one to be made. 477 S.W.2d at 83. Finally, it is important to note that granting relator the right to record his preliminary hearing based on his financial ability and willingness to pay the cost associated with the recording may violate the equal protection clause of the United States Constitutions. *Roberts v. LaVallee*, 389 U.S. 40, 42, 88 S. Ct. 194, 196 (1967)(access to instruments needed to vindicate legal rights based on the financial status of the defendant is repugnant to the equal protection clause of the Constitution).

As to relator's second effort to distinguish his case from the Court's prior rulings that an accused in a non-homicide case has no right to a recorded transcript of his

preliminary hearing, relator argues that Rule 22.10 (formerly Rule 23.12) of the Missouri Rules of Criminal Procedure and § 544.370, RSMo, which provide the authority for the Court's rulings in *Eaton*, *Champ*, *Quinn*, and *Maxwell*, are antiquated by and unconstitutional under *Coleman*. However, this argument overlooks the fact that this Court repealed former Rule 23.12 of the Missouri Rules of Criminal Procedure and adopted Rule 22.10 in its place on January 28, 2002—more than 31 years after *Coleman* was decided. Moreover, Rule 22.10 and § 544.370 require a recorded transcript be made in preliminary hearings involving homicides. Since it is relator's contention that *Coleman* grants all persons accused of a felony the constitutional right to record his preliminary hearing, it seems illogical to conclude that a court rule and statute, which grants such a right on a limited basis, are rendered unconstitutional by *Coleman*.

Relator argues that denying relator the right to record his preliminary hearing limits his ability to defend himself. However, the guarantees of the Constitution call for a hearing appropriate to the nature of the case. As stated above, a preliminary hearing is in no means an adjudication of the innocence or guilt of an accused but is a means to prevent abuse of power by the prosecution. *State v. Menteer*, 845 S.W.2d 581, 583 (Mo. App. 1992). Consequently, a defendant's substantive rights are not affected by a preliminary hearing, which is not even a constitutional requirement or a prerequisite to prosecution by information. *Id*. at 584; *Gerstein*, 420 U.S. at 119; 95 S. Ct. at 865. Since the issue in a preliminary hearing is whether there is probable cause for detaining an accused pending further proceedings, it does not require a full panoply of adversarial safeguards. *Id*. at 121 and 866. Considering that a defendant's substantive rights are not

affected by a preliminary hearing, the potential value of the added procedure that relator advocates—when weighed against the public interest and the administrative burdens, including the costs that the additional procedure would involve—clearly does not compel an expansion of a defendant's constitutional rights. This is particularly true where a defendant who does not prevail at a preliminary hearing has the right to take the deposition of any witness in the case. A defendant can use the deposition transcript at trial to impeach the testimony of any witnesses against him and to preserve the testimony of any favorable witness who will not appear at trial.

Relator's position appears to be that it is both necessary for an accused to record any witness' testimony at the preliminary hearing and at a subsequent deposition to insure that prosecution witnesses will testify consistently. However, relator's assumption that prosecution witnesses will not testify consistently at the preliminary hearing and during their depositions is based entirely on speculation. The purpose of a preliminary hearing has nothing whatsoever to do with improving the reliability of jury verdicts. Considering that a preliminary hearing does not affect a defendant's substantive rights along with the rights afforded defendants under the law, it is purely speculative to suggest that denying relator the right to record his preliminary hearing limits his ability to defend himself at trial in any material way.

A suppression hearing provides a persuasive example for the axiom that the guarantees of the Constitution call for safeguards appropriate to the hearing at issue. Even though a suppression hearing can, and often does, determine the outcome of a case, the interests at stake in such a hearing are of a lesser magnitude than those of the trial

itself. *U.S. v. Raddatz*, 447 U.S. 667, 677-679, 100 S. Ct. 2406, 2413-14 (1980). Accordingly, in deciding a suppression motion, a court can rely on hearsay and other evidence that is not admissible at trial. *Id*. Although it could be argued that the reliance on hearsay evidence in deciding a suppression motion may limit a defendant's right to confront witnesses against him, which is a specific and explicit right contained in the Sixth Amendment, the Supreme Court permits it because the interests at stake are of a lesser magnitude than those in the trial itself, and the defendant is free to argue that the evidence previously sought to be suppressed should be disregarded. *Id*.

Based on the overwhelming weight of the authority and arguments set forth above, it is clear that relator has failed to meet his burden that the Sixth Amendment grants him the constitutional right to record his preliminary hearing. To the contrary, relator has cited this Court to no authority that remotely suggests the Sixth Amendment grants him the constitutional right to record his preliminary hearing. Consequently, it cannot be said that relator will suffer considerable hardship as a consequence of respondent's action by which relator cannot address through other available remedies or by appeal.

Even assuming for the sake of argument that relator will suffer considerable hardship as a consequence of respondent's action, which respondent denies, relator has other remedies—besides a writ of prohibition—available to him by which he can address respondent's actions, including the right to appeal. For example, if relator contends that his preliminary hearing was conducted in violation of his rights and that he was improperly bound over for trial to the circuit court, he can file a motion to quash or dismiss the information filed against him in the circuit court. Alternatively, he can file a

motion with the circuit court requesting that his case be remanded to associate court to correct any alleged violations in the preliminary hearing process. Should the circuit court deny such motions, relator would have the right to present the issues for review to an appellate court upon the conclusion of his case in the trial court.

C. Respondent did not Exceed his Jurisdiction or Abuse his Discretion

Since relator does not have a constitutional right to record his preliminary hearing, the respondent did not act without authority or in excess of his jurisdiction. In denying relator's request to record his preliminary hearing, respondent considered and weighed the facts and circumstances of this case, including the lack of notice given by relator to the prosecution of the intent to record the preliminary hearing, the nature and scope of the preliminary hearing in relation to the objectives relator seeks to advance in recording the hearing, the rights of the relator including his right to later depose the child victim and other witnesses, the additional burden that such a requirement would impose on the criminal system, and the rights afforded to victims by the Missouri Constitution and the laws of this state. MO. CONST. art. I, § 32; MO. REV. STAT. § 595.209 (crime victim's rights are absolute and the policy of this state is that the victim's rights are paramount to defendant's rights).

II. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO RECORD RELATOR'S PRELIMINARY HEARING BECAUSE RESPONDENT IS NOT SUBJECT TO, OR PROHIBITED FROM ACTING BY, THE WRITS ISSUED BY THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT, TO A JUDGE OF THE CIRCUIT COURT OF LACLEDE COUNTY, MISSOURI IN THAT:

A. THE WRITS WERE ISSUED PRIOR TO THE ENACTMENT OF RULE 11(3) OF THE CIRCUIT COURT RULES OF THE TWENTY-SIXTH JUDICIAL CIRCUIT AND FOR THE REASON THAT THE WRITS DO NOT INVALIDATE THE PROVISIONS OF RULE 11(3) SINCE THE RULE IS NOT CONTRARY TO THE WRITS.

B. THE WRITS ARE DIRECTED TO THE JUDGE OF THE COURT WHO MADE THE ORDER BEYOND ITS JURISDICTION AND THEY ONLY APPLY TO OTHER JUDGES, WHO HAVE NOTICE OF THE WRITS AND WHO ARE ACTING UNDER THE AUTHORITY OF THE PROHIBITED COURT, AND RESPONDENT WAS NOT ACTING UNDER THE AUTHORITY OF THE CIRCUIT COURT OF LACLEDE COUNTY, MISSOURI IN DENYING RELATOR'S REQUEST TO RECORD HIS PRELIMINARY HEARING.

Under his second point of error, relator contends that that respondent should be prohibited from denying relator's request to record his preliminary hearing because he

was subject to, or prohibited from exercising his discretion under Rule 11(3) by, the writs issued by the court of appeals against a judge of the Circuit Court of Laclede County. However, relator's argument again fails as unpersuasive and lacking of any relevant authority to support it.

Rule 11(3) was enacted by the Twenty-Sixth Judicial Circuit following the decisions in *State ex rel. Swindle v. Kays* and *State ex rel. Hardey v. Kays*, and ostensibly in direct response to the writs issued by the court of appeals against the lower court judge in those cases. The Twenty-Sixth Judicial Circuit enacted Rule 11(3) on January 1, 1996. *See* Appendix to Relator's Brief. The final order in prohibition in *Swindle* was issued by the court of appeals on September 13, 1995. *See* Appendix to Relator's Brief at A-3 and A-4. In *Hardey*, the court of appeals issued the final order in prohibition on November 22, 1995. *See* Appendix to Relator's Brief at A-5 and A-6. It is clear that the lone reference to the year 1996 in the order in the *Hardey* case is a typographical error particularly since the order contains four references to the year 1995.

Not only does relator claim that the writs, which respondent was not subject to for the reasons set forth below, prohibit respondent from acting but he maintains that they also prohibit all the judges of the Twenty-Sixth Judicial Circuit from making a rule that relator conclusively maintains is contrary to such writs without providing any explanation or authority for how or why Rule 11(3) is in conflict with the writs.

Even assuming for the sake of argument that the writs extend to all the judges of the Twenty-Sixth Judicial Circuit, which respondent denies, Rule 11(3) is not in conflict or contrary to the writs. A review of the final order of prohibition in *Hardey* reveals that

the lower court judge in both cases had a "policy of never allowing the use of a court reporter at a preliminary hearing when some crime other than a homicide . . ." was alleged. (Emphasis added). *See* Appendix to Relator's Brief at A-5. Rule 11(3) was enacted by the Twenty-Sixth Judicial Circuit, to which both Miller and Laclede Counties belong, to allow a defendant to record his preliminary hearing upon the showing of good cause to do so. *See* Appendix to Respondent's Brief.

Relator has also failed to comply with Rule 84.04 of the Civil Rules of Procedure in that he has not cited the Court to any relevant authority for his argument and he has not provided an explanation for the absence of such authority. MO. R. CIV. P. 84.04; *Burkholder ex rel. Burkholder v. Burkholder*, 48 S.W.3d 596, 598 (Mo. 2001); *Thummel v. King*, 570 S.W.2d 679, 687 (Mo. 1978). As a result, relator has not preserved this issue for review and point of error is abandoned. *Id*.

The second reason that relator's argument under Point II must fail, aside from his failure to comply with Rule 84.04, is that respondent is not subject to or prohibited from acting by the writs issued by the court of appeals. In *State ex rel. Siegel v. Strother*, this Court held that writs of prohibition are directed to the judge who has made the order challenged as being beyond the jurisdiction of the court. 289 S.W.2d 73, 78, 365 Mo. 861, 874 (1956). The Court further held that all judges, who have notice of the writ, are prohibited from acting upon the authority of the prohibited court.

The prohibited court in the *Swindle* and *Hardey* cases was the Circuit Court of Laclede County, Missouri. Respondent is a judge of the Circuit Court of Miller County, Missouri. In denying relator's request to record his preliminary hearing, respondent was

not acting under the authority of Circuit Court of Laclede County but under his authority as judge of Miller County.

III. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO RECORD RELATOR'S PRELIMINARY HEARING BECAUSE RESPONDENT DID NOT EXCEED HIS AUTHORITY IN DENYING RELATOR'S REQUEST AND THE DENIAL DOES NOT CONSTITUTE A CLEAR ABUSE OF DISCRETION BY RESPONDENT IN THAT THERE IS NO CONSTITUTIONAL PROVISION, STATUTE, LAW OR RULE THAT PROHIBITS RESPONDENT FROM DENYING RELATOR'S REQUEST AND FOR THE FURTHER REASON THAT RULE 11(3) OF THE RULES OF THE TWENTY-SIXTH JUDICIAL CIRCUIT GRANTS RESPONDENT DISCRETION TO DENY RELATOR'S REQUEST.

The crux of relator's argument in Point III of his brief is difficult to grasp. First of all, relator writes that a writ of prohibition against respondent is appropriate because respondent's denial of relator's request to record his preliminary hearing "is an erroneous declaration and application of the law . . .", and relator does not identify the law. He goes on to write that the denial is an erroneous declaration and application of the law because he contends there is no law. It is difficult for respondent to fashion any type of response or opposition to the point because it seems illogical to conclude that a ruling by a court is misapplication or an erroneous declaration of a law that relator claims does not exist. Perhaps what relator is trying to maintain is that the respondent somehow exceeded his jurisdiction because "the law" did not authorize respondent's ruling.

However, Rule 84.04(d) provides that abstract statements of law are not in compliance with the rule. MO. R. CIV. P. 84.04(d)(4).

Moreover, in arguing his claim of error under Point III, relator has again fails to cite the Court to any relevant authority in support of this claim as required by Rule 84.04 and he has not provided any explanation for the absence of any such authority. Instead, relator simply maintains that respondent's interpretation of Rule 11(3) is erroneous based on (1) relator's "careful" reading and interpretation of the rule, which he asks this Court to substitute for that of respondent, (2) relator's "notions of fairness, decency, and fundamental justice" with regard to what procedures he should be afford for a "fair trial", and (3) relator's interpretation for the purpose of Rule 11(3). As a result, because of the deficiencies associated with Point III of relator's brief, he has not preserved the issue for review and has abandoned it. MO. R. CIV. P. 84.04; *Burkholder ex rel. Burkholder v. Burkholder*, 48 S.W.3d 596, 598 (Mo. 2001); *Thummel v. King*, 570 S.W.2d 679, 687 (Mo. 1978).

Furthermore, relator's claim in Point III that there is no authority that authorizes respondent to act does not provide an adequate explanation for the lack of authority, particularly in light of the authority cited by respondent under Point I of this brief. As written above, this Court affords respondent a presumption of right action, *Thomasville Wood Products,* 512 S.W.2d at 221, and the relator bears the burden of establishing that respondent usurped or acted in excess of his authority. *Eggers,* 609 S.W.2d at 382. It cannot be said that the relator has sustained his burden as to Point III of his brief of

establishing that respondent has usurped or acted in excess of his authority with respect to the denial of relator's request to record his preliminary hearing.

Assuming that Point III of relator's brief is proper to preserve the claim of error for review, which respondent denies, relator's "careful" reading of Rule 11(3) does not support his interpretation of the Rule when read as a whole. Rule 11(2)(a), which relator omitted from the Appendix of his brief, provides that an associate circuit judge, who is assigned a case which requires a record, shall have the record preserved by electronic recording device or "court reporter." Rule 11(2)(b) further provides the rate or method of pay for a certified court reporter, who is not an "official reporter" of the Twenty-Sixth Judicial Circuit and who is employed to report a case as described in Rule 11(2)(a). In addition, Rule 11(2)(c) provides that each associate circuit judge shall cause a division clerk to establish a system for maintaining and retrieving tapes used to record proceedings where such recording devises are utilized in preserving the records. Paragraph (c) of Rule 11(2) further requires that a division clerk shall be responsible for operating such recording devises during any court proceeding in which it is used. Finally, Rule 11(3) provides that all persons except those authorized by the court to preserve the record shall refrain from using recording devices including stenographic reporting in the courtroom while court is in session, provided an associate circuit judge may permit counsel of record to use a recording devise or stenographic equipment during court proceedings.

Reading the rule as a whole, it is clear that the phrase "all persons except those authorized by the court to preserve the record . . ." means all persons other than (1)

"official reporters" of the Twenty-Sixth Judicial Circuit, (2) certified court reporters who are employed by a judge to preserve the record in a case required to be recorded, and (3) each division clerk who is responsible for operating magnetic tape recording devices in proceedings where such recording devices are utilized. Moreover, the exception to the general prohibition against recording by anyone other than those identified by Rule 11(2)(a) through (c) supports this interpretation. It is hard to imagine that the Twenty-Sixth Judicial Circuit enacted a rule that permits counsel of record—in the course of trying their case—to personally operate stenographic equipment during the course of the proceeding, as relator contents. Instead, the exception permits counsel of record to employ and use a court reporter to operate stenographic equipment to record a court proceeding, upon a showing of good cause.

Finally, even assuming that Point III of relator's brief has been properly preserved for review, and that the Court concludes that relator's interpretation of Rule 11(3) is correct, all of which respondent denies, it is not a situation in which the Court should issue a writ of prohibition in that relator has adequate other remedies, such as appeal, motion to dismiss or quash any information filed against him or a motion for remand, by which he can address respondent's actions.

IV. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO RECORD RELATOR'S PRELIMINARY HEARING BECAUSE RESPONDENT DID NOT EXCEED HIS AUTHORITY IN DENYING RELATOR'S REQUEST AND THE DENIAL DOES NOT CONSTITUTE A CLEAR ABUSE OF DISCRETION ON THE PART OF RESPONDENT IN THAT § 544.390, RSMO, DOES NOT REQUIRE A TRANSCRIPT OF A PRELIMINARY HEARING AND FOR THE FURTHER REASON THAT § 544.390 HAS BEEN SUPERSEDED BY A SUBSEQUENTLY ENACTED RULE OF CRIMINAL PROCEDURE.

In his last point, relator argues that he is entitled to an order of prohibition against respondent because respondent's denial of relator's request to record his preliminary hearing violates § 544.390, RSMo, which he contends requires respondent record all preliminary hearings before him and to deliver a certified copy of the recorded transcript to the clerk of the circuit court. However, § 544.390 does not require respondent to certify and return a transcript of the preliminary hearing or docket entries of the preliminary hearing examination. *State v. Ancell*, 62 S.W.2d 443, 447, 333 Mo. 26, 35 (1933). Moreover, § 544.390 has been superseded by court rule and does not constitute authority to support relator's claim. *State v. Fleming*, 451 S.W.2d 119, 121 (Mo. 1970). Accordingly, Point IV of relator's brief has not preserved the issue for review and point of error is abandoned.

Section 544.390 provides that all examinations and recognizances taken in pursuance of the provisions of this chapter shall be certified by the associate circuit judge taking the same and delivered to the clerk of the court in which the offense is cognizable. Stated another way, § 544.390 requires that all preliminary hearing examinations heard by an associate circuit judge and any appearance bonds taken by such judge shall be certified as a record of the associate court to be delivered to the circuit court clerk if the defendant is bound over for trial. *Ancell*, 62 S.W.2d at 447, 333 Mo. at 35. The statute does not provide that the associate circuit judge must certify and return a transcript of the preliminary hearing or docket entries of the preliminary hearing. *Id.*

Assuming that § 544.390 requires an associate circuit judge—in all felony cases—to record and deliver a transcript of the preliminary hearing to the clerk of the circuit court if the defendant is bound over for trial, which respondent denies, it does not constitute relevant authority for Point IV of relator's brief because it has been superseded by court rule. *Fleming*, 451 S.W.2d at 121. In *Fleming*, this Court stated that a rule of procedure adopted by the Court that is inconsistent with a statute, supersedes the statute where the statute has not been annulled or amended by later enactment of the legislature. *Id*. Section 544.390 was enacted by the legislature in 1939 and it has not been annulled or amended by later enactment since that time. Specifically as to § 544.390, the Court in *Fleming* held that the statute was superseded by former Rule 23.11 (now Rule 22.08) in that the rule was derived from § 544.390 and it constitutes a rewriting and revision of the statute. *Id*.

Since relator has relied on a statute that has been superseded by court rule, he has again failed to comply with Rule 84.04 of the Civil Rules of Procedure by not citing Court to any relevant authority for his argument and he has not provided any explanation for such absence of authority. MO. R. CIV. P. 84.04; *Burkholder ex rel. Burkholder v. Burkholder*, 48 S.W.3d 596, 598 (Mo. 2001); *Thummel v. King*, 570 S.W.2d 679, 687 (Mo. 1978). As a result, relator has not preserved this issue for review and point of error is abandoned. *Id*.

CONCLUSION

A decision by this Court making the preliminary writ in this case is clearly contrary the facts in this case and the applicable law. As an extraordinary remedy to correct and prevent a lower court from acting without or in excess of its jurisdiction, it should be issued with great caution in furtherance of justice. It should not be issued in doubtful cases but only when the usurpation of jurisdiction or an act in excess of jurisdiction is clearly evident. In this case, relator is attempting to use the writ of prohibition as a way to infringe upon or direct respondent's discretion, to establish a right or procedure that is clearly not afforded to him, or to correct alleged judicial errors or grievances which may be adequately addressed in the ordinary course of relator's case by other adequate remedies or by appeal.

This Court must afford a presumption of right action to respondent, and it is clear that the relator has not met his burden of establishing that respondent usurped or acted in excess of his authority for the reasons set forth above. Accordingly, respondent requests that this Court quash, dissolve or set aside the preliminary writ in this case and that it dismiss or deny relator's Petition.

Respectfully submitted,

PROSECUTING ATTORNEY OF
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CERTIFICATE OF SERVICE AND OF COMPLIANCE

I hereby certify to the following:

(1) that the attached brief complies with the limitations contained in Rule 84.06(b) of the Missouri Rules of Civil Procedure and contains 9,118, words, excluding the cover page, as determined by Microsoft Word software;

(2) that the floppy disks filed with this brief and served and served on counsel for relator, which contains a copy of this brief, have been scanned for viruses and are virus free;

(3) that two true and correct copy of the above and foregoing brief, and a floppy disk containing a copy of the brief, was served by U.S. mail, postage prepaid on this 12th day of May 2004 on Erik A. Bergmanis and Matthew C. Price, Bergmanis & McDuffey, LLC, P.O. Box 229, Camdenton, Missouri 65020.

RESPONDENT'S APPENDIX

APPENDIX INDEX